

10 CARBON CREST, LLC,

11 Plaintiff,

No. C 19-08179 WHA

12 v.

13 TENCUE PRODUCTIONS, LLC and
14 JEFFREY D. WILK,

Defendants.

ORDER RE BILL OF COSTS

17 **INTRODUCTION**

18 In this diversity action, plaintiff sought payment under a contract. Following a four-day
19 bench trial, an order awarded one and one-half million dollars to plaintiff. Plaintiff's counsel
20 now moves for costs. For the reasons that follow, the motion for costs is **GRANTED IN PART**
21 and **DENIED IN PART**.

22 **STATEMENT**

23 At all material times, defendant Tencue Productions was a California limited liability
24 company. Defendant Jeffrey D. Wilk, a fifty-percent shareholder and board member of
25 Tencue, sought to sell Tencue. In July 2017, Tencue entered into an agreement with plaintiff
26 Carbon Crest, a Delaware limited liability company, under which Carbon Crest would "assist
27 with representing [Tencue] in a potential sale transaction." The sole owner of Carbon Crest,
28 Paul Lewis, was Tencue's financial advisor and a Tencue board member at the time of the

1 agreement. Lewis signed the agreement on behalf of Carbon Crest, and Wilk signed the
2 agreement on behalf of Tencue. The agreement provided that, if a sale of Tencue occurred
3 within 36 months of the agreement's termination, Tencue would pay Carbon Crest a
4 percentage of the sale price. Tencue terminated the agreement, and Tencue was sold six
5 months later. But Tencue and Wilk refused to pay under the agreement.

6 After a bench trial, an order concluded the agreement was void, so plaintiff did not
7 recover in contract. But plaintiff did recover in quasi-contract. Defendants did not recover on
8 their counterclaims.

9 Both parties have since appealed that order. Plaintiff's counsel timely filed a bill of costs
10 for \$22,006.00. Defendants' counsel did not file a timely objection. *See* Civ. Loc. Rule 54.

11 ANALYSIS

12 FRCP 54(d) provides: "Unless a federal statute, these rules, or a court order provides
13 otherwise, costs — other than attorney's fees — should be allowed to the prevailing party."
14 A party must "receive at least some relief on the merits" to be a prevailing party. *Hewitt v.*
15 *Helms*, 482 U.S. 755, 760 (1987). "A party in whose favor judgment is rendered is generally
16 the prevailing party for purposes of awarding costs under [FRCP] 54(d). Nor is it necessary
17 for a party to prevail on all of its claims to be found the prevailing party." *San Diego Police*
18 *Officers' Ass'n v. San Diego City Employees' Ret. Sys.*, 568 F.3d 725, 741 (9th Cir. 2009)
19 (citations omitted). Civil Local Rule 54-3 provides the standards for taxing costs.

20 Our court of appeals has confirmed that a district court "retain[s] the power to award
21 attorney's fees after [a] notice of appeal from [a] decision on the merits [has] been filed." Such
22 a practice permits consolidation of appeals from merits decisions and appeals from cost
23 awards. And, a prompt decision on costs allows the district judge to consider the relevant
24 circumstances when they are "fresh in the mind." *Masalosalo by Masalosalo v. Stonewall Ins.*
25 *Co.*, 718 F.2d 955, 957 (9th Cir. 1983) (affirming award of fees and costs made after notice of
26 appeal of summary judgment).

27 Here, final judgment on the merits was entered in favor of plaintiff and against
28 defendants, so plaintiff was the prevailing party (Dkt. No. 134). Thus, plaintiff's counsel is

1 entitled to all taxable costs under FRCP 54(d). Moreover, plaintiff's counsel complied with
2 Civil Local Rule 54-1. Plaintiff's counsel served and filed a bill of costs, and plaintiff's
3 counsel filed a supporting affidavit. Additionally, plaintiff's counsel attached appropriate
4 documentation supporting each cost claimed.

5 Costs for filing the complaint and service on defendants are taxable under Civil Local
6 Rule 54-3(a). Costs for one original and one copy of the deposition transcripts of defendant
7 Wilk, Kristin Leimkuhler, Kavita Vora, and Miriam Agrell, all of whom testified at trial, are
8 taxable under Civil Local Rule 54-3(c)(1). Costs for reproduction of formal discovery
9 documents and trial exhibits are taxable under Civil Local Rule 54-3(d)(2) and 54-3(d)(4).
10 And, per diem attendance fees and mileage fees that plaintiff's counsel paid to its trial
11 witnesses are taxable under Civil Local Rule 54-3(e).

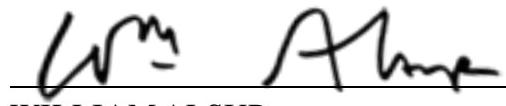
12 But costs for service of subpoenas are not taxable. The local rules allow fees for service
13 of *process* — not service of subpoenas for document production. *Ibrahim v. Dep't of*
14 *Homeland Sec.*, No. C 06-00545 WHA, 2014 WL 1493541, at *3 (N.D. Cal. Apr. 16, 2014)
15 (Judge William Alsup); *Velasquez v. City of Santa Clara*, No. 5:11-CV-03588-PSG, 2014 WL
16 4748429, at *3 (N.D. Cal. Sept. 24, 2014) (Judge Paul Grewal).

17 CONCLUSION

18 For the foregoing reasons, this order awards costs to plaintiff's counsel, with the
19 exception of costs for service of subpoenas (\$555). Thus, the sum of **\$21,451.00** is **TAXED**.

21 IT IS SO ORDERED.

23 Dated: June 3, 2022.

24
25 
26 WILLIAM ALSUP
27 UNITED STATES DISTRICT JUDGE
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